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In The
Supreme Court of the United States
October Term, 1996

STUPAK-THRALL, et al.,
Petitioners,

vs.

UNITED STATES, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE HONORABLE PETER HOEKSTRA -- MEMBER OF CONGRESS DEFENDERS OF PROPERTY RIGHTS AS *AMICI CURIAE** IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF
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AMERICAN HOMEOWNERS FOUNDATION
AMERICAN LAND RIGHTS ASSOCIATION
AMERICAN LOGGERS SOLIDARITY
APARTMENT ASSOCIATION OF SOUTHEASTERN WISCONSIN
BLUE RIBBON COALITION, INC.
BOSTON PROPERTY EQUITY RIGHTS, INC.
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
CISCO CHAIN RIPARIAN OWNERS ASSOC., INC.
CITIZENS AGAINST REPRESSIVE ZONING
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS
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ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION
INTERNATIONAL FOREST PRODUCTS ASSOCIATION
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MAINE CONSERVATION RIGHTS INSTITUTE
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PUTTING PEOPLE FIRST
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TEXAS JUSTICE FOUNDATION
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TRANS TEXAS HERITAGE ASSOCIATION
TRUST PARTNERS ASSOCIATES

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WATERSMEET CHAMBER OF COMMERCE
WATERSMEET SNOWMOBILE CLUB
WATERSMEET TOWNSHIP BOARD
NATIONAL CENTER FOR POLICY ANALYSIS
OHIO REAL ESTATE INVESTORS ASSOCIATION

QUESTIONS PRESENTED FOR REVIEW

1. Whether the fact that the federal government has authority to regulate public land under the Property Clause also gives it authority to regulate adjacent private property?

2. Whether the federal government may, by reason of public land ownership, displace state private property rights and police power regulations on adjacent land?

3. Whether the "valid existing rights" provision contained in the Michigan Wilderness Act stops the government from now claiming that Petitioners' property rights are not grandfathered?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Honorable Peter Hoekstra, Member of Congress represents the Second District of Michigan in the United States Congress.

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders of Property Rights engages in litigation across the county affecting the public interest and its membership to vigorously protect those rights considered essential by the framers of the Constitution.

American Association For Small Property Ownership (AASPO) (Front Royal, VA) is a national grassroots network of landlords, property owners and real estate owners.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners.

American Land Rights Association (Battle Ground, WA) is a grassroots coalition of citizens in or near federally managed areas affected by federal land use and regulation.

American Loggers Solidarity (Fortes, WA) is a grassroots organization made up of individuals, small businesses, corporations and elected officials in seven states.

Apartment Association of Southeastern Wisconsin (Milwaukee, WI), with 900 members, represents rental property owners in southeastern Wisconsin.

Blue Ribbon Coalition, Inc. (Idaho Falls, ID) is a nationwide organization representing 500,000 motorized recreationists, equestrians, and resource users.

Boston Property Equity Rights, Inc. (Boston, MA) is a nonprofit corporation assisting property owners who are victimized by government regulations and actions.

Building Industry Association of Washington (BIAW) (Olympia, WA) is composed of over 6,500 small business members, most of whom are builders and developers of single and multi-family homes.

Cisco Chain Riparian Owners Assoc., Inc. (Land O' Lakes, WI) is a lake property owners association involving fifteen lakes and 1,000 individuals.

Citizens Against Repressive Zoning (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens For Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees.

Committee For A Constructive Tomorrow (Washington, DC) promotes free-market, safe-technological solutions to consumer and environmental concerns.

Crooked Lake North Shore Association (Watersmeet, MI) is a membership of the property and homeowners on Crooked Lake in Watersmeet, Michigan.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) isa group of Texas citizens protecting private property rights in the Davis Mountains and Trans-Pecos areas.

Martin J. Draeger (Watersmeet, MI) is a resident of Long Lake, on Michigan's Upper Peninsula, and a member of the Long Lake Property Owners Association.

Environmental Conservation Organization (ECO) (Hollow Rock, TN) represents 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded to promote the Constitution to ensure the maximum freedom for every American.

Georgia Real Estate Investors Association, Inc. (Atlanta, GA) promotes educating and networking among Georgia real estate investors and students of real estate.

Gogebic County Board of Commissioners (Bessemer, MI) is the elected legislative body representing the county where the property at issue is located.

Heartland Institute (Palatine, IL) is a nonprofit public policy research organization serving the elected officials, journalists, Heartland Members and other opinion leaders.

Hill Country Heritage Association (Lampasas, TX) embraces the conservation of natural resources in conjunction with respect for individual property rights.

Illinois Rental Property Owners Association (Glen Ellyn, IL) is a coalition of Illinois rental property owners associations representing 4,000 property owners.

International Forest Products Association (Portland, OR) is made up of independent family owned wood products companies with members in 13 states who depend on federal timber for their raw material needs.

Landmark Legal Foundation (Kansas City, MO) promotes, through litigation, the free enterprise system and economic liberty, and among other issues, private property rights preservation and limited government.

Maine Conservation Rights Institute (Lubec, ME) is dedicated to private property rights and private conservation, through education and research.

National Association of Reversionary Property Owners (Issaquah, WA) is a nonprofit foundation that assists property owners to protect their land ownership and resist government confiscation.

Northwest Legal Foundation (Minot, ND) exists to protect the rights of individuals, especially real property rights, against confiscatory government action.

Oregonians In Action Legal Center (Tigard, OR) is a nonpartisan, nonprofit, public interest law center protecting the constitutional rights of landowners and countering excessive land use regulation.

Putting People First (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature.

Rights Alliance for Michigan (Bath, MI) is a statewide organization that protects and promote the United States Constitution, particularly property rights.

Stop Taking Our Property (STOP) (Porter County, IN) is comprised of over 300 families who have been impacted by government policies involving property rights.

Texas Justice Foundation (San Antonio, TX) is a nonprofit, public interest, litigation foundation that protects individual rights, and promotes a better business climate.

Ben Thrall (Oswego, IL) is a private property owner on Crooked Lake directly affected by Forest Service activities.

Timber Producers Association of Michigan and Wisconsin (Rhinelander, WI) is a group of timer producers working to assure constitutionality in federal regulation.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization formed to protect landowners rights whose members own over fifteen million acres of land.

Trust Partners Associates (Tucker, GA) owns, rehabilitates and manages apartments, single family homes, buys and brokers loans and discounted mortgages.

Watersmeet Chamber of Commerce (Watersmeet, MI) represents the interests of the business community of Watersmeet, including the Petitioners in this case.

Watersmeet Snowmobile Club (Watersmeet, MI) is dedicated to snowmobiling and multiple uses.

Watersmeet Township Board (Watersmeet, MI) is the elected legislative body representing Watersmeet Township, located adjacent to Crooked Lake.

STATEMENT OF THE CASE

This case presents in bold relief the question of to what extent the federal government can cloak its acts in the robes of a sovereign and extinguish with impunity the rights of the individual property owner. In the instant case, thirteen property owners own land along the shore of Crooked Lake in the upper peninsula of Michigan. Two of these thirteen owners are Petitioners in this case, Kathy Stupak-Thrall and Michael and Bodil Gajewski.

The United States owns, and the Forest Service administers, ninety-five percent of the shoreline of Crooked Lake. In 1987, Congress enacted the Michigan Wilderness Act (MWA) which included the land and all but a small portion of Crooked Lake within the Sylvania Wilderness area. Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274 (1987). Section 5 of the MWA mandates that the United States Forest Service's (USFS) administration of wilderness areas pursuant to the MWA is "subject to valid existing rights." MWA § 5.[1]

Under Michigan law, the private shoreline owners and the federal government possess riparian rights in common to use the entire surface of Crooked Lake. Also, under Michigan

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[1] The Wilderness Act of 1964 itself, which established the National Wilderness Preservation System, contains a similar provision for property rights: "Subject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964. . . ." 16 U.S.C. §§ 1131-36.

law, the rights of a riparian owner are not absolute, and each owner's use must be "reasonable in light of the correlative rights of the other proprietors." *Thompson v. Enz*, 154 N.W.2d 473, 483-84 (Mich. 1967). Inherent in this definition of riparian rights is the notion that one riparian owner may not unilaterally extinguish the reasonable exercise of rights by another riparian owner. *Id.*

However, the court below held that the rights of the federal government were not that of a co-riparian owner but rather, and notably somewhat vaguely, that the government by virtue of the fact that it owned land, somehow was transformed into a sovereign vis-a-vis the other riparian owners. Then, explaining away the "valid existing rights" language contained in the MWA as "ambiguous," the court below held that the federal sovereign was able to extinguish valid existing state-derived rights with impunity. Finally, and perhaps most extraordinary of all, the court held that because the Property Clause gives the federal government the right to administer public land, the federal government can as a sovereign essentially "step into the shoes" of the state and ban the riparian owners' reasonable use of the lake in order to "protect" federal interests.

The protection of federal interests in the instant case is reflected in the 1992 promulgation by the USFS of "Amendment No. 1" to the Forest Management Plan created pursuant to the MWA, which banned the use of sailboats, motorboats, and houseboats on Crooked Lake. Although the use of such boats is permitted under state law, their use is

considered by the USFS inconsistent with the lake's proximity to a federal wilderness area. According to the Wilderness Act of 1964, natural conditions are to prevail within the wilderness area so that there will be "area[s] where the earth and its community of life are untrammeled by man . . ." 16 U.S.C. § 1131(c)(1994).

SUMMARY OF ARGUMENT

For almost one hundred years, at least since the ruling of this Court in *Camfield v. United States*, 167 U.S. 518 (1897), federal courts have grappled with the question of the permissible degree to which the federal government may infringe on the property rights of landowners holding lands adjacent to federal property. Yet until recently, federal courts have rendered decisions which respected the constitutional rights of private property owners by rendering practical and tailored holdings limiting the federal government's ability to accomplish its objectives short of infringing state-derived private rights.

For example, in *Camfield*, this Court held that landowners adjacent to federal land could not build fences to block public access to public land. Likewise, in *United States v. Alford*, 274 U.S. 264 (1927), this Court also held that private landowners adjacent to public land could not build fires which might spread to public land.

Finally, in *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976), this Court rendered the latest in this line of

unremarkable opinions holding that as a property owner, the federal government had the right pursuant to the Property Clause contained in the Constitution to administer its own land: "[T]he general Government doubtless has a power over its own property analogous to the police power of the several States . . ." *Id.* *Kleppe* involved the validity of a federal statute that authorized the federal government to regulate wild burros on federally owned land and further provided for "extension of protection to wild free-roaming horses and burros that stray from public land onto private land[.]" *Id.* at 546. The *Kleppe* Court, however, did not rule on the issue of the government's authority to regulate the wild animals when the animals wandered onto private land.

However, recently some lower courts, notably the court below, seem to have completely lost their bearings on the division of power between a state and the federal government and the limitations on federal power imposed by the Constitution by protecting private property rights. The court below held that the Property Clause of the Constitution -- which gives the federal government explicit authority to regulate public lands -- somehow gives the federal government authority to regulate private property to the point of extinguishing state-derived rights:

> Contrary to plaintiffs' apparent assertions, Congress's inherent authority under this clause is not limited to regulation of purely federal property. In fact since 1897, the Supreme Court has recognized that 'needful' regulations 'respecting' government property will sometimes include the exercise of power over

> *purely private* property, in order to ensure adequate protection of the federal interest.

Stupak-Thrall v. United States, 70 F.3d 881, 885 (6th Cir. 1995), *vacated* 81 F.3d 651 (6th Cir. 1996)(emphasis in original).

As so stated, the holding of the court below suggests that the federal government can -- by virtue of the fact that it owns land in the District of Columbia -- extinguish the rights of boat owners who currently have the right under Virginia law to operate sailboats and motor boats on the Potomac River. Or, that large land owners such as those engaged in cattle ranching on land adjacent to land owned by the Bureau of Land Management could have their otherwise reasonable ranching operations eliminated upon the unilateral assertion that those activities "interfered" with the federal interest.

Such a conclusion flies in the face of the principles long enunciated by this Court providing that property rights derive from state law, *See, e.g., Board of Regents v. Roth*, 498 U.S. 564, 577 (1972), and that the taking of those rights without payment of just compensation violates both the Fifth and the Tenth Amendments to the Constitution. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *New York v. United States*, 505 U.S. 144 (1992).

Accordingly, review by this Court is imperative to provide guidance to lower courts regarding by what power the government redefines state and private property rights.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES SIGNIFICANT UNRESOLVED ISSUES REGARDING THE ABILITY OF THE FEDERAL GOVERNMENT TO REGULATE ADJACENT PRIVATE PROPERTY, THEREBY EXTINGUISHING STATE-DERIVED RIGHTS OF PRIVATE PROPERTY OWNERS.

A. WHETHER THE FEDERAL GOVERNMENT, BY VIRTUE OF OWNERSHIP OF LAND, HAS POWER TO REGULATE ADJACENT PRIVATE PROPERTY IS AN IMPORTANT CONSTITUTIONAL QUESTION.

In 1976, this Court held that the federal government has power, analogous to a state's police power, to administer its own land: "[T]he Government doubtless has a power over its own property analogous to the police power of the several States...Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). However, this Court left open the question of whether that federal power could be extended to adjacent privately or state-owned property. As this case makes clear, it is now time for this Court to resolve this important open question.

Lacking guidance from this Court, the court below has leapt to the erroneous conclusion that because the state has the power within its borders to regulate privately owned riparian rights, then so has the federal government -- pursuant to the Property Clause. Through highly tenuous reasoning, the court below extended the federal power (the analogous state police

power) over public land, to adjacent property, vesting in the federal government the police power belonging to the state of Michigan. *Stupak-Thrall v. United States*, 70 F.3d 881, 889-90 (6th Cir. 1995).

The court below began its analysis by correctly finding that riparian rights in Michigan are not absolute, but may be regulated pursuant to the state's inherent police power. *See, e.g., Miller v. Fabius Township Bd.*, 114 N.W.2d 205 (Mich. 1962)(upholding a state restriction on water skiing) and *Square Lakes Hills Condo Ass'n v. Bloomfield Township*, 471 N.W.2d 321, 322 (Mich. 1991)(upholding a state restriction on boat docking to protect the "health, safety, and welfare" of the general public).

Thus, according to the court below, the USFS can regulate *adjacent* privately owned or state property because of its proximity to federal land under the Property Clause in the United States Constitution.

The Property Clause itself, however, does not contain any suggestion of such expansive power: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

Nor do the cases relied on by the court below provide authority for such an expansive reading of the Property Clause. Indeed, none of the cases cited in the decision below, *Stupak Thrall*, 70 F.3d 881, 885 (6th Cir. 1995)(citing *Kleppe v. New Mexico*, 426 U.S. 529 (1976), *Camfield v.*

United States, 167 U.S. 518 (1897) and *United States v. Alford*, 274 U.S. 264 (1927)), stand for the proposition that the federal government may regulate private property merely because of its proximity to federal property. Even in *Kleppe*, which only stands for the proposition that the federal government has the equivalent of the state's police power over public land, this Court explicitly declined to decide whether this power extended over adjacent private property in order to protect federal interests: "[w]e...leave open the question of the permissible reach of the Act over private lands under the Property Clause." *Kleppe*, 426 U.S. at 547. *Camfield* and *Alford* are more closely on point, but hold merely that the federal government can -- as can any private property owner -- take steps to abate a private nuisance on adjacent property. *Camfield*, 167 U.S. at 525 (government may prevent inholders from erecting on private property fences that enclose federal land on nuisance theory). *Alford*, 294 U.S. at 266 (upholding law prohibiting setting fires on properties adjacent to federal lands on nuisance theory).

Accordingly, this Court should grant review of this case to settle the question of the extent of federal power over private property adjacent to federal property.

B. THERE IS NO AUTHORITY FOR THE COURT BELOW'S HOLDING THAT ANY GOVERNMENT HAS POWER TO EXTINGUISH PRIVATE RIGHTS WITH IMPUNITY IN ORDER TO PROTECT THE PROPERTY RIGHTS OF THE GOVERNMENT.

Even if this Court were to agree that the federal government can exercise state police power over private property, it is an extraordinary leap to then conclude that the federal government can exercise power which even the state itself does not possess.

Under Michigan property law, Petitioners have a property right as riparian owners to engage in reasonable boating activities on Crooked Lake: "When there are several owners to an inland lake, such proprietors...may use the surface of the whole lake for boating, swimming, fishing and other similar riparian rights." *Pierce v. Riley*, 264 N.W.2d 110, 114 (Mich. Ct. App. 1978)(citations omitted). Even if this Court accepts the notion that the federal government may use some form of "police power" to regulate private property adjacent to federal property, there is simply no basis under Michigan law for the either the state or federal government to extinguish a valid, existing right without incurring the constitutional obligation of paying just compensation for the taking of private property rights. *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897)(holding that states must provide same protection under Fourteenth Amendment against

taking of property without just compensation as required of federal government under Fifth Amendment).

Under Michigan law, riparian rights are an indivisible part of the rights inhering in ownership of the abutting shoreline property. *Thompson v. Enz*, 154 N.W.2d 473, 483 (Mich. 1967). Moreover, riparian owners have the right to make reasonable use of the entire surface of the water body abutting their property, free from the interference of others. *Theis v. Howland*, 380 N.W.2d 463, 466 n.3 (Mich. 1985). Whether a riparian use is reasonable "depends upon the particular facts of each case." *Square Lake Hills Condo Ass'n v. Bloomfield Township*, 471 N.W.2d 321, 324 (Mich. 1991). There is simply no evidence in the record in the case that supports the conclusion that the use of sailboats and houseboats on Crooked Lake is unreasonable under Michigan law. Without such a showing, the USFS cannot simply be acting as a "substitute sovereign" in the place of the state, and then be imbued with power to extinguish private rights which even the state itself does not possess.

Thus, the holding below seems to be an especially severe blow to the state's power as a sovereign over Petitioners' riparian rights. And although the power of the federal government is broad, this Court has stated recently that "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Even in cases where this Court has found no interference with state sovereignty, the Court has

held that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 (1975)(upholding federal imposition of wage and price controls on state employees).

Finally, this Court has held repeatedly that property rights are derived from state law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Board of Regents v. Roth*, 498 U.S. 564 (1972). Because the law of property inherently resides in the states, actions by federal agencies that overrule or reinterpret state property law will automatically impair the sovereignty of the states, since the states will no longer have full control over the property laws covering private property within their borders.

Therefore, this Court should grant review in this case to further delineate the boundaries between state and federal authority mandated under the Tenth Amendment by preventing the federal government from abrogating a state-granted right and interfering with state sovereignty.

II. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO ANSWER THE QUESTION OF WHETHER CONGRESS CAN PRESERVE "VALID EXISTING RIGHTS."

In *Preseault v. ICC*, 494 U.S. 1 (1990), this Court held that the normal presumption is that Congress intended for the payment of just compensation for the infringement of

private property rights and left open the question of how Congress may negate this presumption:

> We need not decide what types of official authorization, if any, are necessary to create federal liability under the Fifth Amendment, because we find that rail-to-trail conversions giving rise to just compensation claims are clearly authorized by §8(d). Although Congress did not explicitly promise to pay for any takings, we have always assumed that the Tucker Act is an "implie[d] promis[e]" to pay just compensation which individual laws need not reiterate.

Id. at 13.

It is hard to imagine language more plainly designed to negate the inference that Congress intended that private property rights may be extinguished, and that compensation would be the only remedy for their taking. Indeed, the plain language of the Michigan Wilderness Act of 1987, under which the Sylvania Wilderness Area was formed, seems expressly designed to limit the power of the federal government:

> *Subject to valid existing rights*, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964 governing areas designated by that Act as wilderness areas.

Michigan Wilderness Act of 1987, Pub. L. No. 100-184, § 5, 101 Stat. 1274, 1275-76 (1987)(emphasis added).

In the face of such a clear limitation on federal power, it is surprising that the instant case even arose. However, in its apparently ceaseless appetite to usurp power, the federal government now contends and the court below astonishingly agrees, that this plain language is in fact ambiguous.

Indeed, according to the *en banc* decision of the court below, the "valid existing rights" language contained in the Michigan Wilderness Act was merely designed to codify the Just Compensation Clause contained in the Fifth Amendment. *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996). Under this interpretation, the Just Compensation Clause in the Constitution is a superfluity.

A better view is that the Just Compensation Clause serves only as a baseline for federal legislation, and need not be codified to apply. *Jacobs v. United States*, 290 U.S. 13, 16 (1933)(the right to just compensation "rested upon the Fifth Amendment. Statutory recognition was not necessary.") More likely, as the plain language itself suggests, the "valid existing rights" provision was intended to provide greater protection for these property rights by "grandfathering" an entitlement to the continued validity of such rights.

Additionally, the court below believes that the protection of "valid existing rights" merely means that the USFS may regulate the adjacent property to the extent that Michigan law allows, no matter the degree to which existing property rights are diminished. This extremely novel view of the meaning of "valid existing rights" simply cannot be justified by normal rules of statutory construction or prior case

law. Indeed, as Judge Boggs stated in his dissent to the *en banc* opinion below:

> If Congress had intended to convey such broad-ranging powers, it could have spoken much more clearly. For instance, in addition to the "valid existing rights" language in Section 5 of the MWA, Congress could have included a provision such as this: "Such valid existing rights can be regulated by the Forest Service with the full panoply of police powers possessed by local governments in the State of Michigan relating to such rights...Congress would *not* want simultaneously to delegate a full range of police powers *and* to limit the Forest Service to regulations that did not impinge on "valid existing rights." One of the major functions of police powers is to impinge upon property rights.

Stupak-Thrall v. United States, 89 F.3d 1269, 1291-92 (6th Cir. 1996)(Boggs, J., dissenting)(emphasis in original).

Finally, case law regarding the phrase "valid existing rights" in other contexts clearly contradicts the notion that the use of that phrase delegates state police powers to agencies rather than protecting the rights of property owners. *See Belville Mining v. United States*, 999 F.2d 989 (6th Cir. 1993)(SMCRA "valid existing rights" language prevented prohibition of mining by federal agency if mining clearly allowed under state law); *Aleknagik Natives Ltd. v. United States*, 886 F.2d 237 (9th Cir. 1989)(existing land use rights protected as "valid existing rights" under FLPMA).

Thus, this Court should grant review in this case to prevent government agencies from thwarting the clear intent of

Congress by claiming the right to destroy any "valid existing rights" in existence at the time of the passage of the MWA.

CONCLUSION

For all of these foregoing reasons, the *amici curiae* urge this Court grant the requested Petition for a Writ of Certiorari to review the decision below.

Respectfully submitted,

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